District Court for the City and County of Philadelphia.

ROBERT L. CURRY VS. J. G. HOFFMAN, B. SAGE, ET AL.

1. To a plea of justification in trespass *qu. cl. fr.*, &c., that the acts complained of were rightfully done by the defendants, under an authority vested in them as tax collectors, to enter and distrain for taxes due them in that capacity, the plaintiff replied, protesting that the defendants were not collectors, and that no tax was due, *de injuria*, as to the *residue* of the plea. Held good.
2. How far *de injuria* may be replied generally to a justification under authority in law, not derived from a Court of record, *quære.*

This was an action of trespass *qu. cl. fr.*, and *de bonis asportatis.*

The declaration set forth in substance—That on the 25th of April, 1851, defendants with force, &c., broke into a certain close of plaintiff, situate in the of West Philadelphia, in the county aforesaid, and took divers goods, viz: 5 horses, 5 carts, 5 screens, and 5 sets of harness of plaintiff's, then being in said close of said plaintiff, of the value of $500, and carried away the same, and converted, &c., to their own use, and other wrongs, &c.

The defendants pleaded—1. Not guilty; 2d. Amended plea of Justification:—

That before and during the year 1850 and at the time when, &c., the plaintiff was possessed of a certain close, &c., in 3d Ward of the District (then Borough) of West Philadelphia, &c.; that the said lot and improvements were duly valued and assessed, according to law, at $1800, and the taxes assessed thereon as follows, (stating the amount of the State, County, Borough and Poor taxes, respectivly, on the close and on plaintiff personally); that Hoffman was duly appointed collector of the Borough and Poor taxes for 1st and 3d Wards, and Sage of the State and County taxes for said Borough for 1850. That on the 1st February, 1851, a sum of money, viz. $27, the amount of said taxes for 1850, was due by plaintiff and unpaid, and was payable to said Hoffman and Sage respectively, as collectors, &c.; that then and there and at divers other times, said sum was duly demanded of plaintiff by and on behalf of said Hoffman and Sage as collectors, &c., but plaintiff neglected and refused,

and hath ever since neglected and refused to make payment of said amount so due by him. Wherefore the defendants, Hoffman and Sage, in their rights as collectors of taxes, &c., and by virtue of the Act of Assembly, &c., and the said Miller as their bailiff, and by their command, on the 25th April, 1851, viz. 30 days from the time of demand so made, did enter into and upon said lot and improvements, in order to levy said amount of taxes by distress, and did then and there seize, levy and distrain on one horse, one cart, one set of cart harness and three screens, and no other articles, goods or chattels, and sold said horse, cart and harness by public sale, after giving 10 days public notice of sale by written and printed advertisements, for the sum of $32.38½; and immediately after said sale returned said three screens to plaintiff; that the proceeds of said sale were applied by said Hoffman and Sage to the payment of said amount of tax so due by plaintiff, and to the expenses of levying on and selling the articles aforesaid, which is the same supposed trespass, &c.

The plaintiff replied to the second plea, protesting that said Hoffman was not duly appointed collector, &c., and that said Sage was not so appointed collector, &c., and that before, &c., plaintiff was not possessed of a close in, &c., valued at $1800, and that the taxes thereon assessed were not as follows, viz: (as in plea,); and that defendants of their own wrong, and without the residue of the cause in their said amended plea mentioned, committed the said trespass, &c.

To this replication the defendants demurred, and assigned the following causes of demurrer, to wit:

1. That although the defendants in their amended plea, have justified the committing the supposed trespass, &c., by virtue of their right as collectors of taxes, &c., to distrain, levy on and sell said goods for the payment of taxes, &c., yet the plaintiff instead of stating his particular answer (if any he has) to said amended plea, or directly and simply traversing one of the matters stated therein, or confessing and avoiding such matters, hath by his replication (after protest as to divers facts alleged in said amended plea) replied generally, that defendants of their own wrong, and without the

residue of the cause in their said amended plea mentioned, committed the said trespass in plaintiffs declaration complained of.

2. That plaintiff, instead of stating his particular answer (if any he hath) to said amended plea, has replied generally *de injuria sua propria.*

for Defendants.

Longstreth, for Plaintiff.

The opinion of the court was delivered by

HARE, J.—The declaration in this case is in trespass, and the plea a justification of the acts complained of, on the ground that they were done rightfully under the authority vested in the defendants as tax collectors, to enter and distrain for money due to them in that capacity. The replication protests that the defendants were not collectors, and that no taxes were due, and then goes on to aver that they committed the alleged trespass of their own wrong and without the residue of the cause set forth in the plea. This replication was met by a demurrer, which the defendants sought to sustain at the argument, on the ground that the replication put various matters in issue, instead of being confined to a traverse, or confession and avoidance of a single point; and was moreover inadmissible in answer to a plea which was a justification, and not an excuse. The latter objection is not stated as a cause of demurrer in the pleadings, but we are willing to express our opinion upon it, as well as the former.

Crogate's Case, (8 Rep. 66,) is well known as the leading case on this point of pleading, and the resolutions of the court as reported by Coke, are the premises on which subsequent judges and lawyers have founded their conclusions. It is, however, not a little difficult to reconcile the first resolution in that case with one of the reasons given in support of the second. For while it is said in the first resolution that a justification under the proceedings of a Court, not of record, may be traversed by a replication *de injuria sua propria*, a replication in the same form to a plea justifying under an interest in, or an easement attached to land is said to be invalid in the second resolution, because *de injuria* ought only to be replied when the plea is matter of excuse and not of interest. If this reason be

taken in its more general sense, it necessarily applies to a defence based on the proceedings of any competent tribunal, whether of record or not, for he who shows that he has acted under the authority of the law, shows the fullest and highest legal justification, whatever may have been the channel through which the authority is derived. It has accordingly been held in a number of cases in New York and elsewhere, that the plaintiff cannot answer a justification under the process or decree of a superior or inferior Court, by alleging that the act complained of was done by the defendant of his own wrong without the cause alleged in the plea. In *Lytle* vs. *Lee*, (15 Johnson, 112,) where this ground was first taken, the justification was under the judgement of a Court of record, and therefore, immediately within the first resolution in *Crogate's case*, but C. J. Kent preferred to rest his own opinion on the general principle that such a replication is only admissible where the defence is matter of excuse, and not of absolute right. The rule, said he, "as laid down in Crogate's case, (8 Co. 66,) and which has since been repeatedly recognized, (*Cooper* vs. *Monke*, Willis' Rep. 54; *Jones* vs. *Kitchen*, 1 Bos. & Pull. 76,) is, that the general replication *de injuria sua propria absque tali causa*, is bad, when the defendant insists on a right, and is good only, when he pleads matter of excuse." Similar views were expressed in *Plumb* vs. *McCrea*, (12 Johnson, 491,) and *Griswold* vs. *Sedgwick*, (1 Wend. 126;) but as the justification in these cases was also under the process of a Court of record, the right to reply *de injuria* to plea justifying under the authority of a Court not of record can hardly be said to have been presented in a shape for decision. But in *Coburn* vs. *Hopkins*, (4 Wend. 577,) where the defendant justified under a warrant from a justice of the peace, and was therefore clearly without the first resolution with regard to matter of record; a replication *de injuria* was held demurrable on the ground that the defence was one of right and not of excuse. In delivering the opinion of the Court, Sutherland, J. held the following language:—"The general replication *de injuria sua propria absque tali causa* is bad when the defendant *justifies* or *insists on a right*, and is good only when he pleads *matter* of *excuse*; (*Crogate's case*, 8 Coke 66; Willes 54; 1 Bos. & Pull, 76;

Com. Dig. Plead. F. 18 to 20,) and this rule is not confined to cases where the plea sets up *matter* of *record* as well as matter of fact, and where the general replication would put in issue to the jury the matter of record as well as the matter of fact. Ch. J. Kent, in *Lytle* vs. *Lee & Ruggles*, (5 Johns. R. 114) does not consider this the true ground of the rule, but holds such a replication to be bad wherever the plea insists upon a full and adequate right or justification. In such a case, the plaintiff is bound to traverse his right."

Notwithstanding the respect due to the authority of these decisions, their soundness might be questioned, and they certainly go much beyond many of the cases on which they profess to be based. The case of *Jones* vs. *Kitchin*, 1 Bos. & Pull. 76, does not sustain this decision, for as the defendant in that case justified under the title of a third person, and an authority derived from him. This replication was clearly bad under the second and third resolutions in *Crogate's case*, as involving matter of authority and title, and the opinion of the Court went on that ground, and not on the ground held in New York.

The same remark applies to the case of *Cooper* vs. *Monke*, (Willis 42,) when the plea justified the taking of the plaintiff's goods and chattels as a distress for rent, and therefore involved matter of title and commandment, which cannot be traversed by a replication *de injuria*. And while there would seem to be no English case which decides that the reason given in the second resolution, overthrows or weakens the force of the express words of the first resolution, that "*de injuria*" may generally be replied to a justification by force of any proceeding in the Admiral Court, hundred or county, or any other court which is not a court of record, because all is matter of fact, and all makes but one cause; there are several which rule the point the other way. Thus in *Selby* vs. *Barden*, (3 B. & Ad. 1,) where the defendant justified under a warrant of two justices commanding him to distrain the goods of the plaintiff for non-payment of taxes; the plaintiff was held entitled to reply, that the defendant had acted of his own wrong and without the

cause alleged in the plea, and thus put the whole justification in issue by one traverse.

Were we obliged to reconcile what appears to be a discrepancy between this case, and those already cited from the New York reports, we should feel some difficulty, but we are relieved from this necessity by the case of *Stickle* vs. *Richmond*, (1 Hill, 78,) where the court re-affirm the doctrine held in *Plumb* vs. *McCrea*, and *Coburn* vs. *Hopkins*, but decide notwithstanding, that if the plaintiff admitted that portion of a plea of justification, which consisted in the allegation of an authority in law, he might go on to aver, that the defendant did the act in question of his own wrong, and without the residue of the cause alleged in the plea. Now that is precisely what the plaintiff has done here, for of the three points which make up the defence in the plea, viz: that a tax had been assessed against the plaintiff, that the defendants had authority and law to collect it, and that the acts complained of in the declaration, were done in pursuance of that authority, the last only is put at issue, and the others simply met by a protestation. The replication is therefore good under all the authorities on this point; and it is equally free from the objection of multifariousness, for as it does not deny that the defendants had the authority which they allege, but merely disputes the mode in which their authority was exercised, and all the facts which it puts in issue bear on that single point cannot be doubted. There is nothing in *Crogate's* case which conflicts with this reasoning, for although one of the grounds for giving judgment for the defendant in Crogate's case, was multifariousness, yet the replication there embraced not only different facts but different points of a character, too remote and dissimilar to be properly brought within the scope of one issue, and it plainly appears from the first resolution, that various matters of fact may be traversed when they make but one cause.

"I agree," said Eyre, C. J., in *Jones* vs. *Kitchin*, "to the rule laid down in *Cockerill* vs. *Armstrong*, (Bullers, N. P., 93,) that where the excuse arises in part out of the seisin in fee of another, then *de injuria sua propria*, is not to be replied. But the reason is not because it puts two or three things in issue, for that may

happen in every case where the defense arises out of several facts, all operating to one point of excuse; the reason is because this plea is only allowed when an excuse is offered for personal injuries, and not even if it relates to any interest in hand or to any commandment." The replication *de injuria*, seems moreover, to be entitled to more latitude than an ordinary traverse, and to be meant to bring many different but not divurging rays into one legal focus.

The different matters put at issue in *Selby* vs. *Barden*, could have been denied by a direct traverse without duplicity. And in *Griffin* vs. *Yates*, 2 B. N. C., 379, where the court overruled a traverse in the ordinary form on the ground of duplicity, they held that the same matters might be put at issue without objection, by replying *de injuria*.

However this may be, it is enough to say without speculating further on the questions on which the cases differ, that they all concur, as to the point on which we base this decision.

The defendants may withdraw their demurrer and plead issuably within eight days; otherwise

Judgment for plaintiff.[1]

[1] The later English cases warrant the use of the replication *de injuria*, though the plea sets up a justification under an "authority given by the law," unless it be at the same time derived mediately or immediately from the plaintiff, or be the process of a court of record. Barden vs. Selby, 9 Bingh. 756, (in error;) Bowler vs. Nicholson, 12 Ad. & Ellis, 341; Edmunds vs. Penniger, 7 Q. B. 558; Mortimer vs. Moore, 8 Q. B. 294; Price vs. Woodhouse, 16 M. & W. 1; See, however, Worsley vs. The South Devon Rail Road Company, 4 Eng. L. & Eq., 230. And the exception with regard to "matter of interest" in the defendant, applies only where that interest existed anterior to, and independently of the act of trespass complained of, and was not created thereby. Barden vs. Selby, ut supr. The distinction indeed between a plea in justification, and a plea in excuse, as such, appears entirely unfounded. See Salter vs. Purchell, 1 Q. B. 220.—*Eds.*